Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

October 1 through December 31, 2005

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Production Summary

- The active inventory totalled 5,304 (33% over the target of 4,000 cases).

- Incoming appeals numbered 1,111; of these, 923 were appeals from WSIB decisions and 188 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 814 new appeals and 244 reactivated appeals recorded in the third quarter of 2005.
  - In the 4th quarter of 2004 the Tribunal recorded 961 new appeals and 163 re-activations.
  - In 2004, the weekly average of hearing ready appellants was 74. For Q4 2005, the weekly average of hearing ready appellants is 58. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,190; this includes 466 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 724 after hearing dispositions; of the after hearing dispositions, 688 followed from Tribunal decisions.

- The inactive inventory increased by 49 cases to 4,284 (at the end of Q3-05, inactive inventory was 4235 cases).

- In Q4 2005, 81% of final decisions were released within 120 days. Overall in 2005, 81% of final decisions were released within 120 days.

- Due to a lack of adjudicative resources, the Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. This also led to delays in the pre-hearing areas.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the fourth quarter of 2005, the notice inventory included 1,519 dormant cases, the active inventory totaled 5,304 cases, and the inactive inventory totaled 4,284 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q4-2004	5191
Q1-2005	5158
Q2-2005	5353
Q3-2005	5383
Q4-2005	5304

B. Incoming Appeals

Period	Incoming Appeals
Q4-2004	1124
Q1-2005	1123
Q2-2005	1198
Q3-2005	1058
Q4-2005	1111

C. Dispositions

Period	Dispositions -- total	Pre-hearing	After Hearing
Q4-2004	1119	472	647
Q1-2005	1136	456	680
Q2-2005	1048	416	632
Q3-2005	1015	479	536
Q4-2005	1190	466	724

D. Inactive Inventory

Period	Inactive Inventory
Q4-2004	4141
Q1-2005	4189
Q2-2005	4242
Q3-2005	4235
Q4-2005	4284

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q4-2004	1531	-37
Q1-2005	1551	20
Q2-2005	1506	-45
Q3-2005	1519	13
Q4-2005	1519	0

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Communications

The Tribunal organized and hosted a very successful Symposium in honour of its 20th Anniversary. The event was held October 6th, 2005 and consisted of 3 Panels, followed by a reception. Speakers included David Mullan, professor emeritus, Queen's University law School, The Honourable Justice S. T. Goudge, Ontario Court of Appeal, John Slinger, chief corporate services office of the WSIB, Ian J. Strachan, Chair, WSIAT and S. Ron Ellis, past chair, WCAT. A summary of the speakers' notes is available in the November issue of In Focus, the Tribunal's newsletter, and from the web site, www.wsiat.on.ca.

On November 28, 2005, Tribunal staff and OICs organized and presented an in house training session. The topics included decision writing techniques and tips, final FEL reviews and a choice of small group sessions.

In December 2005, the Tribunal entered into an agreement with CanLII to post its decisions on their public web site (www.canlii.org). The CanLII site will offer a full text search of Tribunal decisions; this will be available in early 2006.

Also expected in 2006, the WSIAT Reporter will be available in electronic format. The last paper issue of the Reporter will feature a history of its publication. Please visit the WSIAT web site for more details.

Judicial Review Activity

At the end of 2005, the Tribunal had reason to regard its record on applications for judicial review with pride. After twenty years, and the issuing of more than thirty five thousand decisions, every decision of the Tribunal challenged on judicial review has been upheld by the courts.

The status of applications for judicial review involving the Tribunal for the final quarter of 2005 are set out below. It was a busy quarter. Only those judicial reviews where there was activity during the quarter are listed. There are a number of other pending judicial reviews in which there was no action during this particular quarter.

Judicial Reviews

1. **Decisions Nos. 770/98I (October 27, 1999) and 770/98IR (February 5, 2002); *Roach v. Ontario (Workplace Safety & Insurance Appeals Tribunal)* [2005] O.J. 1295 (C.A.)**

   As noted in earlier quarterly reports, on April 7th, 2005, the Court of Appeal unanimously granted the Tribunal's appeal from a decision of the Divisional Court which had quashed the above Tribunal decision.

   This case involves a worker who was granted chronic pain entitlement by the Board, but was awarded no future economic loss. She appealed this to the Tribunal, alleging she did not have chronic pain, but instead had an organic condition known as traumatic vertebrobasilar ischemia (TVBI). The Tribunal dismissed the appeal. In *Decision No. 770/98I*, the Tribunal Panel confirmed the worker had chronic pain. In coming to this finding, the Panel concluded the worker had hit her head only once at the time of her accident.

   The worker then requested the Tribunal reconsider the finding in *Decision No. 770/98I* that she had a non-organic condition. She also argued in the alternative, as a new issue, that she had a somatoform disorder. In support of her reconsideration the worker submitted an affidavit from a co-worker. The affidavit said the co-worker could now recall that in 1991 the worker had struck her head twice at the time of the accident. In *Decision No. 770/98IR*, the Panel denied the reconsideration, and confirmed the worker did not have the organic condition TVBI. However, the Panel found that the worker had a somatoform disorder, rather than chronic pain.

f the Tribunal decision that she did not
The worker applied for judicial review of
have an organic condition.

nal Court on April 19th, 2004. The
The judicial review was heard in Divisiorcision was patently unreasonable. The
Divisional Court found the Tribunal's dec the way the Panel had dealt with the co-
Divisional Court was not satisfied about in regards to the number of times the
worker's affidavit on the reconsiderationonal Court decision also stated that the
worker had struck her head. The Divisic the conflict in the medical evidence.
Tribunal had not satisfactorily dealt with

. the position that the Divisional Court had
At the Court of Appeal the Tribunal tookion was written the way it was because it
failed to appreciate the Tribunal's decisin. The test on a reconsideration is
was a *reconsideration* of its first decisiorve there was a significant defect in the
whether there was good reason to belie the original decision. Further, the
decision that would change the result of the Panel in rejecting the affidavit were
Tribunal argued the reasons provided byas certainly not patently unreasonable.
more than adequate, and the decision w

al's appeal. MacPherson J., writing for
The Court of Appeal granted the Tribuna/iew was patent unreasonableness. He
the Court, reaffirmed the standard of rev d in its conclusion that the Tribunal
stated that the Divisional Court had erre to the findings of the Divisional Court, the
decision should be quashed. Contrary tcision had focused on the correct issue;
Court of Appeal found the Tribunal's dec ction of the affidavit evidence; and the
that it had sufficiently explained the reje e medical evidence and had explicitly
Tribunal had dealt extensively with all thhysicians.
resolved the conflicting opinions of the p

The Court of Appeal stated:

d all the evidence and reached, and
> "The Tribunal carefully considere the Tribunal did precisely what it was
> explained, its decision. In short, t
> supposed to do."

ion of the Divisional Court and reinstated
The Court of Appeal set aside the decisi
the final decision of the Tribunal.

ive to appeal to the Supreme Court of
The Applicant filed an application for lea Supreme Court of Canada dismissed the
Canada. On November 10th, 2005 the Sf Justice McLachlin, Justice Binnie and
application for leave to appeal (per Chie
Justice Charron).

) and 1584/02R (June 16, 2004);

2. **Decisions Nos. 1584/02 (July 15, 2003y *and Insurance Appeals Tribunal)***
Klimczak v. Ontario (Workplace Safet
[2005] O.J. No. 5219

The worker, a car salesman, had a congenital lesion in his brain which was asymptomatic until 1993. In 1991 he suffered an injury when the rear door on a van was accidentally shut on his head. The worker did not seek any medical attention for this injury. Eighteen months later the worker had a seizure, and alleged it was caused by the head injury. The Panel denied the worker's appeal, finding there was no entitlement for the seizures.

The worker's application for judicial review was heard on November 29th. After hearing from counsel for the Applicant and for the Tribunal, the Divisional Court panel of Justices Pardu, Epstein and Lax dismissed the application. The Court stated that, as per the *Roach* decision, the standard of review was patent unreasonableness, and the Tribunal carefully reviewed the considerable volume of evidence and reached and explained its decision.

3. **Decision No. 117/04 (September 27, 2004); *Lawrence v. Workplace Safety & Insurance Appeals Tribunal* [December 20, 2005] unreported, Divisional Court**

A courier was injured while making a delivery. He brought an action for damages. The defendants applied to the Tribunal under the *Act*. A Tribunal panel found the courier was a worker under the Act, rather than an independent operator, and that his right of action was therefore taken away. Counsel for the worker commenced an application for judicial review.

The Divisional Court heard the judicial review in London on November 9th, 2005. After hearing from counsel for the Applicant, counsel for the defendant and counsel for the Tribunal, the Panel of Cunningham ACJ, Platona J and Pierce J reserved.

The decision, released on December 20th, 2005, dismissed the application for judicial review. The Divisional Court found that the "Tribunal is a specialized body protected by a strong privative clause, and is entitled to curial deference in its interpretation of its constituent statute and assessment of the facts....Even if we might have come to a different conclusion, we are of the view that the Tribunal used the correct approach and applied the correct principles."

4. **Decisions Nos. 18/88I (March 22, 1988) and 18/88 (October 27, 1988); *Lopez v. Workplace Safety & Insurance Appeals Tribunal, Workplace Safety & Insurance Board, and Toronto General Hospital* [December 14, 2005] unreported (Ontario Superior Court)**

In 1988 a Tribunal heard an appeal from the worker for further benefits as of January 1986. The worker believed that the WSIB had wrongfully released his

medical information to his employer. In his view, because the Board had released his information, the Tribunal had no jurisdiction to hear the appeal.

The Panel did not agree and rendered a decision that the Tribunal had jurisdiction to hear his appeal. As the Panel commented, it was not clear what the worker's remedy would be if he couldn't appeal to the Tribunal.

Fifteen years later, the worker commenced an application for judicial review of the Tribunal's decision. He sought relief under the Charter against the Board and Tribunal, as well as various other novel remedies. While preparing to file a further motion, it was discovered that the Applicant had been declared a vexatious litigant in another proceeding. Under s.140 of the *Courts of Justice Act*, a vexatious litigant can only proceed with a new proceeding if he gets leave of the Court.

The Applicant made numerous unsuccessful attempts in Superior Court and the Court of Appeal to overturn the finding that he was a vexatious litigant. Eventually the Court of Appeal decreed the Applicant could file no further materials with respect to that matter. The Applicant then sought leave to proceed only with the judicial review application.

That motion was heard before Justice Sachs on December 14th, 2005. After hearing from the Applicant, counsel for the Board and counsel for the Tribunal, Justice Sachs found that the Applicant had not provided any evidence to satisfy her that his judicial review application should be allowed to proceed. She also ordered that no further material relating to this application is to be accepted by the Court, if such material is inadvertently received the matter will not be listed, and if listed it should be removed from the list without a hearing.

Section 140(4)(e) states that "no appeal lies from a refusal to grant relief to the applicant".

5. Decision No. 1509/02 (February 2, 2004)

Two sisters were suspended at the same time for smoking in a non-smoking area at work. Sister #1 in *Decision No. 1384/03* reported an accident within a few hours of returning after her suspension. Sister #2 (*Decision No. 1509/02*) reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (*Decision No. 1384/03*). She brought an application for judicial review. On April 6th, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim was allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker. Sister #2 then also brought an application for judicial review.

Although Sister #1's judicial review had been dismissed, Sister #2 filed a factum to proceed with her own application for judicial review. However, during this quarter Sister #2 decided to adjourn the judicial review and filed an application for reconsideration with the Tribunal. The Tribunal consented to the adjournment. At the end of 2005 the reconsideration application was still pending at the Tribunal.

6. **Decisions Nos. 1858/99 (February 10, 2000), 1858/99R (December 27, 2000), and 1858/99R2 (April 15, 2005)**

This Tribunal decision denied a s.147(4) supplement. The Applicant commenced a judicial review, and then asked to adjourn it to pursue an application for reconsideration.

The reconsideration was denied by a different Tribunal Panel. During this quarter, the Applicant filed a Notice of Abandonment of the judicial review.

7. **Decisions Nos. 653/99 (November 15, 1999) and 653/99R (January 21, 2002)**

The Tribunal denied the worker's appeal for an increased future economic loss and non-economic loss, on the grounds that the worker's medical condition was caused by non-compensable factors. The worker delayed more than three years before bringing the application for judicial review. There were technical problems with the Applicant's materials. At the end of the quarter the Applicant revised and re-served his materials.

8. **Decisions Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)**

The Vice-Chair denied entitlement to a worker for a back disability. Counsel for the worker served an application for judicial review. After a significant delay, in the final quarter of 2005 the Applicant served revised materials. At the end of the quarter the Tribunal filed its factum. A date has been set to hear the application for judicial review in Sudbury on March 20, 2006.

9. **Decisions Nos. 2454/03 (January 20, 2004) and 2454/03R (September 15, 2004)**

The Tribunal found that the Applicant's work did not play a significant role in the development of his bilateral carpal tunnel syndrome, and denied him entitlement for benefits. The Applicant commenced an application for judicial review. During this quarter the Tribunal filed a Record of Proceedings and was preparing its factum.

10. Decisions Nos.1022/02 (December 9, 2003), 1022/02R (August 18, 2004) and 1022/02R2 (November 1, 2005)

Decision No. 1022/02 denied the worker entitlement for benefits for a bi-lateral shoulder and related left elbow condition that the worker claimed resulted from a disablement injury that occurred in the course of his employment. The worker subsequently retained another representative, who requested that the Tribunal re-open *Decision No. 1022/02* on the basis that there were errors in the Tribunal's process.

In *Decision No. 1022/02R*, the original vice-chair denied the reconsideration request. Counsel for the applicant initially commenced an application for judicial review, then decided to adjourn the judicial review to pursue a further reconsideration application at the Tribunal. In the second reconsideration request, a different vice-chair decided that *Decision No. 1022/02* should be re-opened. The second vice-chair found that a defect in the Tribunal's process occurred at the outset of the hearing of the worker's appeal, in that the worker and his previous counsel were not of one mind on the question of whether the worker required a translator. While acknowledging the substantial inconvenience to the parties, the second vice-chair held the hearing ought to have been adjourned to enable the worker and his counsel to rectify the lack of communication. As the threshold for reconsideration had been satisfied, the appeal will be reheard.

Recent Decisions

Time Limits—Notice of Accident by Worker

Decision Nos. 1136/05 and 1072/05 are good examples of the approach to WSIA time limits for filing notice of an accident. Under Board Policy, the issue of whether it is just to extend the time to file the claim turns on whether or not there are exceptional circumstances to justify the delay. Practically, the time extension considerations focus on the worker's reason for not reporting the injury rather than on the merits of the claim.

In *Decision No. 1136/05*, the worker filed a claim two years and three months after an accident date. The Vice-Chair found that while the worker's symptoms may have been sufficiently minor that she did not fully understand the nature of her injury initially, the worker certainly should have reported the claim about 1.5 years after the accident when she took two weeks off work as a result of the injury. The delay was too long to support an extension of time to file the claim. Thus, this is a situation where actual delay and the consequent prejudice bar the time extension.

In *Decision No. 1072/05*, the worker submitted her notice of accident on a disablement basis more than three years after the accident date. The Vice-Chair considered there were no personal reasons to grant an extension of time to file a claim, nor were there exceptional circumstances which explained the delay. The case also noted that the failure to report an injury that may be related to repetitive activity where there is a risk of further aggravation deprives the employer *and* the Board of the opportunity to take remedial action that might limit the extent of the nature of the injury as well as the relevant costs to the employer.

Decision No. 1569/04 considered the issue of "substantial compliance" with time limits under the legislation and relevant Board policy. In this case, the Vice Chair found that the worker failed to file the form two years after the accident, but had, filed a continuity report within six months. The employer had filed its relevant form and had met with the worker to address modified work. The Tribunal noted that while the worker should have filed the relevant paper form in a timely fashion, there was substantial compliance with the six month time period. In this case, the employer had notice of the accident and the nature of the complaint. There was no prejudice in extending the time to file the claim.

Time Limits—Filing a Notice of Appeal - Diligence

Decision No. 3536/00 ER3 considers the extent to which a representative's conduct may impact a worker's right to pursue an appeal, and specifically, the failure to launch an appeal on time. The decision considered that the approach which imputes a representative's conduct to a client follows the view that the representative and client are one unit, so that the client "lives or dies" by the representative's skill and competence. Civil courts have held that there are limitations on this approach even in adversarial court proceedings. Since the workers' compensation system is intended to be a non-adversarial system, as a general rule, a just claim will not be denied solely

because of the failure of a representative to represent a client properly. Accordingly, it is necessary to consider the conduct of the representative separately from that of the party. On this basis, the Tribunal examined other factors relevant to the time extension issues, including the conduct and intentions of the worker to appeal.

Affidavit evidence indicated that the worker attempted to clarify the status of her appeal with her representative and had been told that the appeal had been filed. As the worker acted diligently but was misled, and since that representative had been found guilty of misconduct in an immigration context, the time extension was allowed.

Tribunal Jurisdiction – Right to Sue - Standing

Decision No. 465/05 considers the interaction between the workplace insurance and no-fault motor vehicle insurance schemes.

In this case, a driver was granted statutory accident benefits and then successfully claimed Workers' Compensation at the Board. He did not start a civil suit for damages. The insurer commenced an application under s.31 for a determination that the driver was entitled to compensation under the WSIA.

The driver argued that, in the absence of a civil suit, there was no "plaintiff" under s.31(1)(c) and the Tribunal did not have jurisdiction. The insurer argued that s.31(1)(c) should be read broadly to include an insurer when there was a "claimant" but no "plaintiff".

The Panel noted the previous wording under the pre-1997 Act, which contained wording that allowed consideration as to whether the "claimant" is entitled to benefits under the WSIA. This wording did not appear in s.31(1) of WSIA. The Panel further noted that under the Insurance Act, an insurer is not required to pay statutory accident benefits to an insured person who is entitled to receive workers' compensation benefits. Section 59(1) and (2) of O. Reg. 403/96 under the Insurance Act stipulate that, while an insurer is not required to pay statutory accident benefits to a person who is entitled to receive workers' compensation benefits, that provision ceases to apply in respect of an insured person who elects to bring an action referred to in s. 30 of the WSIA.

The Panel found that, up to the point where an insured person elects to commence legal action, the relations between the insured and the insurer are determined by reference to the provisions of the Insurance Act, but once a person commences a legal action, the insurer loses the right to stop payment of statutory accident benefits and must seek remedies under s. 31 of the WSIA. Similarly, under the WSIA, once a person entitled to workplace insurance benefits elects to commence legal action, that person becomes subject to detailed code set out in s. 30 of the WSIA.

In the Panel's view, there is reason why an insurer of a plaintiff or a party to an action would require a determination regarding the status of a plaintiff. However, the Panel did

nt of statutory accident benefits, or the not see a compelling reason why a claimar in order to determine the insured's insurer, would need recourse to the WSIA entitlement to statutory accident benefits.

not have jurisdiction to determine whether the The Panel concluded that the Tribunal did the WSIA because he was not a plaintiff in an driver was entitled to claim benefits under t action within s. 31(1).

January 2006